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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5522

DATE COMPLAINT FILED: August 27, 2004

DATE OF NOTIFICATION: September 2, 2004

DATE ACTIVATED: October 14, 2004

EXPIRATION OF SOL: July 1, 2009

COMPLAINANT: Campaign Legal Center

RESPONDENT: Wisconsin Right to Life, Inc.

RELEVANT STATUTES: 2 U.S.C. § 441b(a)
11 C.F.R. § 114.2(b)(2)(iii)
11 C.F.R. § 114.4(c)(6)
11 C.F.R. § 114.4(c)(6)(i)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Campaign Legal Center ("CLC") filed a complaint alleging that Wisconsin Right to Life, Inc. ("WRTL") violated 2 U.S.C. § 441b(a) and (b) of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act") by endorsing President George W. Bush on its website. Specifically, CLC claims that a photograph of President Bush on WRTL's homepage that linked to a list of endorsed candidates violated 11 C.F.R. § 114.4(c)(6), which allows limited

1 corporate endorsements, and 11 C.F.R. § 114.2(b)(2)(iii), which prohibits electioneering
2 communications by corporations to those outside the restricted class.¹

3 WRTL argues that the First Amendment protects WRTL's activities. It further argues
4 that the photograph of President Bush was removed from the website quickly (date not specified)
5 and that WRTL's non-connected committee ("WRL-PAC"), not WRTL, made and paid for the
6 endorsement pages. WRTL also argues that the endorsement did not constitute an independent
7 expenditure or an electioneering communication and that the value of the endorsement is not
8 cognizable.

9 As more fully set forth below, there is some question as to whether WRTL or WRL-PAC
10 paid all the costs associated with the endorsements. WRTL states without explanation that
11 WRL-PAC paid for the webpages that listed the endorsements, but it did not provide information
12 regarding how much WRL-PAC paid and, in other section of its response to the complaint,
13 argues that the costs of adding information to the website would be de minimus or without
14 cognizable value. If the costs had no cognizable value, it is unclear on what basis WRTL claims
15 the costs were paid or reimbursed by WRL-PAC and how much. WRL-PAC's disclosure reports
16 do not answer these questions because they do not disclose any disbursements made in
17 connection with WRTL's website. Moreover, WRTL makes no assertion, and there is no
18 information available indicating, that WRL-PAC paid for or reimbursed WRTL for the costs
19 associated with posting the photograph of President Bush on the homepage and creating the link
20 from the homepage to the candidate endorsement pages. For all these reasons, there is a
21 sufficient basis to investigate whether WRTL paid for any or all the Internet costs associated with

¹ The complaint does not specify how WRTL violated Section 441b(b).

1 the endorsements. Nevertheless, because these costs were likely minimal and because the
2 endorsements do not appear to have been publicized beyond the press release and website, this
3 Office recommends that the Commission find reason to believe that WRTL violated 2 U.S.C. §
4 441b(a) and 11 C.F.R. § 114.4(c)(6) but that no further action be taken other than to send an
5 admonishment letter.

6 **II. FACTUAL SUMMARY**

7 WRTL is a nonprofit, 501(c)(4) corporation located in Milwaukee, Wisconsin, that
8 promotes pro-life causes.² See www.wrtl.org.³ Wisconsin Right to Life-PAC ("WRL-PAC") is a
9 non-connected political committee that is located in Milwaukee at the same address as WRTL;
10 the corporation and WRL-PAC appear to share some staff as well. WRL-PAC does not have its
11 own website; WRTL uses its website to include information about, and issue news releases for,
12 WRL-PAC.

13 On July 28, 2004, WRL-PAC issued a press release directing readers to its list of
14 endorsed candidates that was "available for viewing at www.wrtl.org." See Attachment 1;
15 Complaint, Exhibit 3. The website's homepage included a column on the left-hand side with a
16 small box. The box contained the words "WRL-PAC ENDORSED CANDIDATES" and a
17 headshot photograph of President Bush. See Attachment 2 and CLC Complaint ("Complaint"),
18 Exhibit 2. The box hyperlinked directly, and sometime later indirectly through an intermediate
19 webpage, to a three-page PDF document entitled "Endorsed Pro-Life Candidates – For the

² WRTL admitted in *WRTL v. FEC*, No. 04-1260 (D.D.C. Aug. 17, 2004), that it is not a "qualified nonprofit corporation" permitted to make independent expenditures.

³ According to www.whois.com, a website registration information service, WRTL's website is registered to Wisconsin Right to Life.

1 Tuesday, September 14, 2004 Primary Election.” *See* Complaint, at 2; *see also* WRTL Response
2 (“Response”), at 1. The document stated, “The Wisconsin Right to Life PAC (Political Action
3 Committee) has endorsed the candidates listed below.” *See* Complaint, Exhibit 3. The document
4 listed federal and state candidates running for election in the Wisconsin primaries and included
5 Bush for President, three U.S. Senate candidates and eight U.S. House candidates.⁴ *See id.*
6 Sometime after the September primary election, the endorsement list changed to reflect primary
7 election winners and became entitled “Endorsed Pro-Life Candidates – For the Tuesday,
8 November 2 General Election.” *See* Attachment 3. At the bottom of the third page of the
9 endorsement list, there was a disclaimer in small print: “Authorized and Paid for by the
10 Wisconsin Right to Life PAC. 10625 W. North Ave., Suite LL, Milwaukee, WI 53227 – (416)
11 778-5780 – Not authorized by any candidate or candidate’s committee.” *See id.*

12 At some point before October 6, 2004, the photograph of Bush was removed from
13 WRTL’s homepage, although the box linking to the PAC-endorsed candidate list remained on
14 WRTL’s homepage through mid-November 2004. *See* Response, at 1 and Exhibit A.

15 The press release announcing the endorsements is available by going to the WRTL
16 website and clicking on “Newsroom.” It appears that all press releases issued by WRTL and
17 WRL-PAC are posted on the WRTL website in reverse chronological order by year of issuance.

18 According to WRTL, WRL-PAC paid for the endorsement pages. *See* Response, at 1 and
19 9. Neither WRL-PAC’s disclosure reports nor any other available information provides
20 information regarding which entity paid for the costs associated with posting the photograph on
21 the homepage and creating the hyperlink to the endorsements.

⁴ The majority of endorsed candidates were running for state and local offices in Wisconsin.

1 **III. LEGAL ANALYSIS**

2 Corporations are prohibited from making contributions or expenditures from their general
3 treasury funds in connection with any election of any candidate for Federal office. *See* 2 U.S.C.
4 § 441b(a). The Act broadly defines a contribution or expenditure by a corporation to cover any
5 services or anything of value made to any candidate in connection with any Federal election. *See*
6 2 U.S.C. § 441b(b)(2). Nevertheless, a corporation may endorse a federal candidate and may
7 communicate the endorsement to its restricted class in a publication provided that no more than a
8 de minimus number of copies are circulated beyond the restricted class. 11 C.F.R. § 114.4(c)(6).
9 A corporation may also publicly announce the endorsement through a press release and press
10 conference as long as the disbursements for them are de minimus. 11 C.F.R. § 114.4(c)(6)(i).
11 The disbursements will be considered de minimus if the press release and notice of the press
12 conference are distributed only to the news media that the corporation customarily contacts when
13 issuing non-political press releases or holding press conferences for other purposes. *Id.*

14 The complaint argues that WRTL violated 11 C.F.R. § 114.4(c)(6) because WRTL did
15 not restrict access to the photographic endorsement of President Bush to WRTL's members or
16 restricted class. Although the complaint acknowledges that the website states that WRL-PAC
17 made the endorsements, the complaint counters that the photograph is not on a WRL-PAC
18 website but rather on the corporate WRTL website and, thus, is a prohibited corporate
19 expenditure. In addition, the complaint states that by placing President Bush's photograph on the
20 website homepage, the corporation's announcement of its endorsement was not distributed in a
21 manner permitted by 11 C.F.R. § 114.4(c)(6)(i).

1 WRTL responds that the Internet endorsement falls within the safe harbor provided by the
2 Commission's endorsement regulation because the costs associated with posting information on
3 the Internet are de minimus and the dissemination of the endorsement was de minimus in that
4 only those who chose to visit WRTL's website would see it. WRTL makes several additional
5 arguments, namely that (1) the Commission does not have a sufficiently compelling interest to
6 regulate speech (Internet pages and links) that costs nothing; (2) the Commission should not be
7 regulating Internet content at all; (3) the costs of the endorsement were not cognizable and,
8 therefore, cannot be considered expenditures; and (4) the photograph and website link to text are
9 not express advocacy.⁵

10 In two prior MURs, the Commission found reason to believe that corporate endorsements
11 posted on the Internet violated FECA. In MUR 4607 (National Council of Senior Citizens
12 1998), the respondent membership association endorsed President Clinton in the 1996 election
13 on its website. Because the website did not restrict public access to the endorsement by, for
14 example, the use of a password,⁶ the endorsement's circulation was not de minimus and, thus the
15 Commission found reason to believe that the National Council of Senior Citizens violated FECA.
16 Similarly, in MUR 4686 (New York State AFL-CIO 1999), the respondent placed materials
17 endorsing Eric Vitaliano for Congress in a monthly newsletter usually sent only to the
18 respondent's members. The respondent also posted the newsletter on its website, which was
19 available to the public. The Commission found RTB that the website endorsement resulted in a

⁵ WRTL does not dispute that the communications at issue constitute an endorsement, which by definition expressly advocates the election of a candidate. Thus, an express advocacy analysis is not necessary, the endorsement is governed by the Commission's endorsement regulation. See 11 C.F.R. § 114.4(c)(6).

⁶ The Commission had suggested passwords as a way to restrict access to website endorsements. See AO 1997-16.

1 prohibited corporate expenditure by New York State AFL-CIO because it was communicated
2 beyond the restricted class.

3 In both cases, the Commission found reason to believe that the website endorsements
4 violated FECA but, nevertheless, took no further action. The Commission cited the relative
5 difficulty in locating the endorsements on the Internet⁷ and, in MUR 4686, noted the de minimus
6 costs associated with posting information on the Internet.

7 Here, the available information indicates that although the endorsement pages included a
8 statement that they were paid and authorized by WRL-PAC, the hyperlink to the endorsements,
9 which included a photograph of President Bush, appeared on WRTL's corporate website
10 homepage. Even assuming the endorsement pages were paid for by WRL-PAC, a fact not
11 disclosed in the committee's disclosure reports, there is no information indicating that WRL-
12 PAC paid for or reimbursed WRTL the costs of the modification and maintenance of the website
13 associated with posting the candidate endorsements on the website.⁸ The absence of this
14 information, and the fact that WRTL's website homepage contained an endorsement of President
15 Bush and the homepage linked to the candidate endorsements, suggest that WRTL funds,
16 facilities and personnel may have been used to make and disseminate the endorsements to the
17 general public without reimbursement by WRL-PAC. Under these circumstances, the
18 distribution of the endorsements would constitute corporate activity, not WRL-PAC activity.
19 *See, e.g.,* AO 1997-16 (Oregon Natural Resources Council Action).

⁷ At the time of the activities at issue in the two MURs (1996-1997), website browsers did not have the expansive searching capabilities they have today.

⁸ According to disclosure reports, WRL-PAC did not report any costs of modifying and maintaining WRTL's website in connection with posting the endorsements on the website, although the expenses may not have exceeded the \$200 reporting threshold. *See* 11 C.F.R. § 104.3(b)(3).

1 This Office recommends that the Commission find reason to believe that WRTL
2 violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.4(c)(6) by posting endorsements on its website
3 that were communicated outside the corporation's restricted class, but take no action other than
4 sending an admonishment letter. First, the corporate expenditure associated with providing the
5 photograph and link on WRTL's homepage, which would serve as the basis for a civil penalty, is
6 likely minimal.⁹ Second, it appears that WRTL removed President Bush's photograph, about
7 which CLC primarily complained, shortly after receiving CLC's complaint. Finally, although it
8 is unknown how many people beyond WRTL's restricted class read the endorsements, there is no
9 information that WRTL or WRL-PAC publicized the endorsements in any way other than
10 WRTL's website itself and in a press release issued by WRL-PAC.

11 The complaint also alleges that the endorsement constituted an impermissible
12 electioneering communication made within 30 days of the Republican National Convention, in
13 violation of 11 C.F.R. § 114.2(b)(2)(iii).¹⁰ An electioneering communication is any broadcast,
14 cable, or satellite communication that refers to a clearly identified candidate and is made, in
15 relevant part, within 30 days before a political party's nominating convention. *See* 2 U.S.C.
16 § 434(f)(3)(A). A communication over the Internet does not, however, fall within the statutory
17 definition of an electioneering communication; therefore, WRTL's Internet endorsement is not a
18 prohibited corporate expenditure in violation of 11 C.F.R. § 114.2(b)(2)(iii). Thus, this Office

⁹ The Commission recently took a similar approach in MUR 5281 (*American Muslim Council, et al.*). There, the Commission found reason to believe that two corporations violated Section 441b by making prohibited corporate expenditures through the establishment and operation of websites that contained express advocacy and solicitations on behalf of a federal candidate, but took no further action other than admonishment because the costs associated with the website communications were likely minimal.

¹⁰ The recent decision in *Shays v. FEC*, D.D.C., No. 02-1984 (CKK) (Sept. 18, 2004), does not affect this aspect of the Electioneering Communications regulation.

recommends that the Commission find no reason to believe that WRTL violated 11 C.F.R. § 114.2(b)(2)(iii).

IV. RECOMMENDATIONS

1. Find reason to believe that Wisconsin Right to Life violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.4(c)(6) but take no further action other than sending an admonishment letter.
2. Find no reason to believe that Wisconsin Right to Life violated 11 C.F.R. § 114.2(b)(2)(iii).
3. Approve the appropriate letters.
4. Close the file.

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1/14/05
Date

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Attachments

1. WRL-PAC July 28, 2004 Press Release
2. WRTL website homepage (Aug. 26. 2004)
3. List of endorsed 2004 General Election candidates